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In the Supreme Court of the United States

OCTOBER TERM, 1977

ST. PAUL FIRE & MARINE INSURANCE CO., ET AL.,
PETITIONERS

v.

DAVID M. BARRY, M.D., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

The United States has the primary responsibility for enforcing the antitrust laws. It is concerned that statutes creating exemptions from those laws not be interpreted more broadly than is necessary to effectuate the congressional purpose in providing those exemptions. In addition, the extent to which the antitrust laws apply to the insurance industry is a matter of considerable importance to the United States in determining whether to act against anticompetitive conduct by insurance companies.

QUESTIONS PRESENTED

The McCarran-Ferguson Act makes the antitrust laws applicable to the business of insurance only "to the extent that such business is not regulated by State Law" (15 U.S.C. 1012(b)). It provides, however, that nothing in that Act "shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation" (15 U.S.C. 1013(b)). The United States will discuss the following questions:

1. Whether the Sherman Act applies to all boycotts, coercion, or intimidation by insurance companies rather than, as petitioners contend, only to such practices when directed against members of the insurance industry.

2. Whether the only boycotts by the insurance industry to which the Sherman Act applies are those directed against competitors of the boycotter.

STATUTES INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *.

The McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U.S.C. 1011–1015, provides in pertinent part:

[Section 1] Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States. [15 U.S.C. 1011.]

[Section 2] (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the * * * Sherman Act, and the * * * Clayton Act, and * * * the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law. [15 U.S.C. 1012.]

[Section 3(b)] Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation. [15 U.S.C. 1013(b).]

STATEMENT

Respondents, physicians and patients in Rhode Island, filed this civil antitrust suit in the United States District Court for the District of Rhode Island, on behalf of Rhode Island physicians and their patients, against the four petitioner insurance companies, who sold medical malpractice insurance in that state (Pet. App. 38a–42a). The complaint made the following allegations:

Petitioners conspired "to deny any medical malpractice insurance coverage on an 'Occurrence Basis' to all of the physicians insured with defendant, St. Paul" in April 1975 (¶ 30, Pet. App. 47a), and "to deny any medical malpractice insurance coverage on any basis to certain hospitals insured with defendant, St. Paul, at said time" (¶ 31, Pet. App. 47a). An "occurrence" basis policy covers claims arising out of acts done during the term of the policy, even when the claim is made after the policy has expired; a "claims made" policy covers only claims asserted while the policy is in force (¶¶ 24, 27, Pet. App. 46a).

In April 1975, petitioner St. Paul Fire & Marine Insurance Co. ("St. Paul") announced that it would not renew medical malpractice coverage on an "occurrence" basis, but would issue coverage only on a "claims made" basis (¶ 28, Pet. App. 46a–47a). Following St. Paul's announcement and in furtherance of the conspiracy, petitioners Aetna Casualty & Surety Co., Travelers Indemnity of Rhode Island (and two affiliated Travelers Companies) and Hartford Casualty Company (and an affiliated Hartford Company) (¶¶ 4, 5, 6, Pet. App. 40a–41a) have refused to accept applications for medical malpractice insurance from physicians, hospitals or other medical personnel whom St. Paul then insured (¶ 32, Pet. App. 47a–48a). Petitioners "engaged in a purposeful course of coercion, intimidation, boycott and unfair competition with respect to the sale of medical malpractice insurance in the State of Rhode Island" (¶ 35, Pet. App. 48a).

The district court dismissed the complaint, ruling that the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U.S.C. 1011–1015, immunized the insurance companies from antitrust liability in this case (Pet. App. 26a–37a). It held that the conduct charged in the complaint involved the "business of insurance" (*id.* at 29a) and that the state regulated that business (*id.* at 29a–30a). The court ruled that the McCarran-Ferguson Act barred this suit unless the conduct charged came within Section 3(b) of that Act, 15 U.S.C. 1013(b), exempting from the Act agreements or acts of boycott, coercion, or intimidation (*id.* at 31a). Observing that, although "on first glance" this provision covered the plaintiffs' claims (*ibid.*), the court applied decisions that limited Section 3(b) to combinations that "blacklist" insurance agents or insurance companies (*id.* at 31a–32a).

A divided court of appeals reversed (*id.* at 1a–21a). The court rejected those decisions limiting Section 3(b) to the insurance industry (*id.* at 6a–7a). It stated that the language of Section 3(b) is neither

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ambiguous nor senseless (*id.* at 7a), but its clear terms authorize an antitrust suit against an insurance company by anyone, including consumers, victimized by any boycott, coercion, or intimidation that the Sherman Act prohibits (*id.* at 7a–8a). The court noted that permitting consumers to litigate those specific antitrust violations will not "hamstring" state regulatory bodies (*id.* at 9a–10a), but will advance the national policy in favor of competition (*id.* at 10a–11a).

The court then examined the legislative history of the Act "in deference to the courts which have found support in that history" (*id.* at 12a). After a thorough analysis of the legislative history of Section 3(b) (*id.* at 6a–7a, 12a–18a), the court concluded that there is no evidence in that history that "would justify our reading the boycott provision in the special [blacklist] way" the insurance companies urged (*id.* at 18a).

SUMMARY OF ARGUMENT

I

A. The language and purpose of the McCarran-Ferguson Act show that Section 3(b) of that Act, which continues the applicability of the Sherman Act to boycotts, coercion, or intimidation by members of the insurance industry, is not limited to those practices when they are directed against members of the industry. It also includes boycotts, coercion, or intimidation directed against policyholders.

The language of Section 3(b) is broad and unqualified: it covers "any" boycott, coercion, or intimidation. If Congress had intended to limit the scope of Section 3(b) as petitioners contend, it presumably would have said so. The language apparently derives from *United States* v. *South-Eastern Underwriters Association,* 322 U.S. 533, where the Court used those words in describing the indictment and in explaining why application of the Sherman Act to such practices would not destroy state regulation of the insurance business. In *South-Eastern Underwriters,* the insurance companies' condemned practices were directed against both "competitors and consumers" (322 U.S. at 562); when Congress used the same language in Section 3(b), it intended the words to have the same scope.

Application of the Sherman Act to insurance company boycotts, coercion, or intimidation directed against policyholders would not interfere with state regulation of the insurance industry, which the McCarran-Ferguson Act was intended to preserve.

B. The legislative history of the McCarran-Ferguson Act confirms that Congress intended Section 3(b) to cover all boycotts, coercion, or intimidation by the insurance industry. Although that history shows that Congress was concerned with industry "blacklisting" of agents and companies, the court of appeals correctly noted that it contains "no suggestion that the legislation was limited to th[e] evil * * * of insurance company self-government outside the law" (Pet.

App. 17a). To the contrary, the history shows that Congress intended to continue the application of the Sherman Act to all boycotts, coercion, or intimidation.

II

The conduct charged in respondents' complaint constituted a "boycott" under both Section 1 of the Sherman Act and the McCarran-Ferguson Act. A boycott under the Sherman Act is not limited to action directed against competitors, but covers any concerted refusal to deal. This Court repeatedly has condemned as an illegal boycott a concerted refusal by manufacturers and distributors to deal with retail outlets. See, *e.g., Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U.S. 457; *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207.

Respondents' complaint charged a boycott under these principles. It alleged that three of the petitioner insurance companies concertedly refused "to accept any applications for medical malpractice insurance of any type from any physicians, hospitals or other medical personnel presently insured by defendant, St. Paul" (¶ 32, Pet. App. 47a–48a). The charge was not just a refusal to deal on certain terms, but a refusal to deal at all. It is a classic example of a boycott that the Sherman Act condemns. There is therefore no occasion in this case to determine the precise contours of what constitutes a boycott under either the Sherman Act or the McCarran-Ferguson Act.

ARGUMENT

I

THE MC CARRAN-FERGUSON ACT'S PROVISION MAKING THE SHERMAN ACT APPLICABLE TO ANY BOYCOTT, COERCION, OR INTIMIDATION BY THE INSURANCE INDUSTRY COVERS SUCH PRACTICES WHEN DIRECTED AGAINST PERSONS OUTSIDE THAT INDUSTRY

A. THE LANGUAGE AND PURPOSE OF THE ACT COVER ALL BOYCOTTS, COERCION, OR INTIMIDATION, AND DO NOT SANCTION THOSE PRACTICES WHEN DIRECTED OUTSIDE THE INSURANCE INDUSTRY

1. Section2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b), exempts the insurance business from the antitrust laws except "to the extent that such business is not regulated by State law." Section 3(b) of that Act, however, provides:

> Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Nothing in this broad language indicates, or even suggests, that Congress did not thereby intend to continue in effect the Sherman Act's well settled prohibition of all restraints of trade involving boycott, coercion, or intimidation. The language is sweeping: the Sherman Act remains applicable to "any" agreement to boycott, coerce, or intimidate, or to "any" of those acts themselves. "[G]roup boycotts"—which is one of the charges here—are among those "agreements or practices which because of their pernicious effect on

competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use" (*Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 5).

If Congress had intended to permit the insurance industry to engage in those pernicious practices against persons outside the industry without incurring Sherman Act liability, and had intended to prohibit those practices only when directed against members of the industry, presumably it would have made that intention explicit. Instead, it used the broadest possible language: the Sherman Act continues to cover "any" boycott, coercion, or intimidation. The language of Section 3(b) of the McCarran-Ferguson Act gives no hint that Congress intended the coverage of the Sherman Act in its applicability to these practices to be any less comprehensive because the particular restraints are imposed by insurance companies. Cf. *Pfizer, Inc.* v. *Government of India,* No. 76–749, decided January 11, 1978, slip op. 4.

As the court of appeals noted (Pet. App. 16a–17a), the phrase "boycott, coercion, or intimidation" in Section 3(b) apparently stemmed from this Court's opinion in *United States* v. *South-Eastern Underwriters Association,* 322 U.S. 533. There the Court stated that the indictment charged, among other things, that insurance companies "employed boycotts together with other types of coercion and intimidation to force

non-member insurance companies into the conspiracy, and to compel persons who needed insurance to buy only from S.E.U.A. members on S.E.U.A. terms" (322 U.S. at 535). In rejecting the claim that applying the Sherman Act to the insurance business would destroy much state regulation of that business (*id.* at 561), the Court stated (*id.* at 562; footnote omitted):

> No states authorize combinations of insurance companies to coerce, intimidate, and boycott competitors and consumers in the manner here alleged, and it cannot be that any companies have acquired a vested right to engage in such destructive business practices.

South-Eastern Underwriters was a case in which the insurance companies' boycotts, coercion and intimidation were directed against both "competitors and consumers." When Congress in Section 3(b) of the McCarran-Ferguson Act continued the applicability of the Sherman Act to "such destructive business practices," it intended to cover those practices when directed against consumers as well as against competitors.

"[E]xemptions from antitrust laws are strictly construed" (*Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 733). The McCarran-Ferguson Act is such an exemption. Section 3(b) of that Act, which limits the exemption, should not be construed to give the McCarran-Ferguson antitrust exemption a broader scope than Congress intended. Cf. *Maryland and Virginia Milk Producers Association, Inc.* v. *United States,* 362 U.S. 458, 464–467.

2. The basic purpose of the McCarran-Ferguson Act was to remove doubts, created by the decision in *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533, concerning the constitutional power of the states to tax and to regulate insurance, and to insure that state regulation could be continued. See S. Rep. No. 20, 79th Cong., 1st Sess. 1–2 (1945); H.R. Rep. No. 143, 79th Cong., 1st Sess. (1945). Legislators supporting the bill emphasized this purpose of restoring and protecting state jurisdiction over insurance.[1]

Section 1 of the McCarran-Ferguson Act, 15 U.S.C. 1011, declares that "the continued regulation and taxation by the several States of the business of insurance is in the public interest." Section 2 accomplishes this purpose by withdrawing federal authority to regulate the competitive practices of the industry "in those States which are regulating those practices under their own laws" (*Federal Trade Commission* v. *National Casualty Co.*, 357 U.S. 560, 563). Congress, however, also recognized that continuing the applicability of the Sherman Act to boycotts, coercion and intimidation would not interfere with or handicap the effective state regulation of insurance which it was feared the *South-Eastern Underwriters* decision might have jeopardized.

As the court of appeals correctly stated in this case (Pet. App. 9a), "[n]or would the introduction of anti-

[1] *E.g.*, 91 Cong. Rec. 1087 (1945) (remarks of Rep. Hancock); 91 Cong. Rec. 1090–1091 (1945) (remarks of Rep. Gwynne); 91 Cong. Rec. 1092 (1945) (remarks of Rep. Springer).

trust principles into dealings between policyholders and insurers hamstring the state regulatory bodies that have primary responsibility for overseeing the nation's insurance business." It is difficult to see why the States' regulatory interest would preclude application of the Sherman Act to boycotts, coercion or intimidation against policyholders, who are not subject to direct state regulation, but not against members of the insurance industry itself, which is subject to such regulation.

Thus, the court of appeals' interpretation of Section 3(b) would not emasculate the States' authority effectively to regulate the business of insurance, which the McCarran-Ferguson Act was designed to preserve. Nor, contrary to the concern of *amici curiae* American Insurance Association, the Alliance of American Insurers and the National Association of Independent Insurers (Br. 3–26), would it disrupt the concerted activities in which the insurance industry now engages pursuant to state regulation.[2]

[2] *Amici* cite a Justice Department Report to support their prediction of increased antitrust liability for insurance companies (*id.* at 22–23, citing *The Pricing and Marketing of Insurance*, Report of the U.S. Department of Justice to the Task Group on Antitrust Immunities, p. 170, (January 1977). However, that report, which generally recommended the wide-spread application of antitrust principles to the insurance industry, acknowledged that many concerted activities described in the *amici* brief could continue even if the McCarran-Ferguson Act antitrust exemption were repealed (Report, pp. vii–viii):

"Antitrust precedent indicates that insurance companies could pool their loss experience through a statistical bureau consistent with federal antitrust standards. Moreover, the federal antitrust

Moreover, our view that Section 3(b) means what it says—that it covers "any" boycott, coercion or intimidation—furthers what the court of appeals correctly recognized to be "[a] primary aim of the antitrust law * * * assuring consumers the benefits of a free market economy" (Pet. App. 10a). Respondents' complaint alleges that, as a result of petitioners' boycott, coercion and intimidation, "the physicians of Rhode Island insured by defendant, St. Paul, have been placed in the position where they are unable to obtain medical malpractice insurance on a reasonable basis after June 30, 1975" (¶ 36, Pet. App. 49a); and that "plaintiff patients will be forced to incur expenses for medical services and hospitalization far in excess of what they should be charged in the absence of" petitioners' violations of the antitrust laws (¶ 18, Pet. App. 59a).

B. THE LEGISLATIVE HISTORY OF THE McCARRAN-FERGUSON ACT CONFIRMS THAT SECTION 3(b) CONTINUES THE APPLICABILITY OF THE SHERMAN ACT TO ALL BOYCOTTS, COERCION, OR INTIMIDATION BY THE INSURANCE INDUSTRY

The legislative history of the McCarran-Ferguson Act confirms that the broad language of Section 3(b) continues the applicability of the Sherman Act to all

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laws would not prohibit any necessary trending of future losses on a composite basis by advisory organizations that were independent of the companies they were serving. Likewise, the antitrust laws would not prohibit those voluntary risk-sharing arrangements, such as insurance pools and reinsurance agreements, that were either necessary to the conduct of business or served some other legitimate business purpose without substantially lessening competition."

boycotts, coercion or intimidation by the insurance industry, and is not limited to only those of such practices that are directed against members of the industry. There are indications in the legislative history that Congress was concerned with industry "blacklisting" of agents and companies. But in its totality that history shows that the legislature intended Section 3(b) to have the broad scope we urge. It contains "no suggestion that the legislation was limited to th[e] evil * * * of insurance company self-government outside the law" (Pet. App. 17a). Accord, *Proctor* v. *State Farm Mutual,* 561 F. 2d 262, 271–274 (C.A.D.C.), petition for a writ of certiorari pending, No. 77–580.

1. The bill that became the McCarran-Ferguson Act originated in the Senate (S. 340, 79th Cong., 1st Sess. (1945)). The Senate Committee Report on the bill described the boycott, coercion, and intimidation provision of the initial draft (S. Rep. No. 20, 79th Cong., 1st Sess. 3 (1945)) as follows:

> Section 4 * * * (*b*) provides that at no time are the prohibitions in the Sherman Act against any agreement or act of boycott, coercion, or intimidation, suspended. These provisions of the Sherman Act remain in full force and effect.

The House Report used the identical language. H.R. Rep. No. 143, 79th Cong., 1st Sess. 3 (1945). These reports show that Congress intended "the prohibitions in the Sherman Act" against "any" boycott, coercion, or intimidation by insurance companies to "remain in full force and effect."

Statements made during the Senate debate similarly indicate the unlimited scope of Section 3(b). Asked whether the Act would sanction attempts to monopolize, Senator Ferguson replied: "No. * * * [I]f agreements in restraint of trade or to monopolize amounted either to a boycott and/or coercion and/or intimidation, they would be absolutely void * * *." 91 Cong. Rec. 480 (1945). Subsequently, Senators McCarran and Ferguson discussed the scope of Section 3(b) (91 Cong. Rec. 1443 (1945); emphasis added):

> Mr. FERGUSON. I believe that a statement as to the fair construction of the act would add to the helpfulness of what the Senator from Nevada has said. There are certain things which a State cannot interfere with. It cannot interfere with the application of the Sherman Act to *any* agreement to boycott, coerce, or intimidate, or act of boycotting, coercion, or intimidation.
>
> Mr. MCCARRAN. Not at any time.
>
> Mr. FERGUSON. Not at any time.
>
> Mr. MCCARRAN. Nor is the control of those matters under the specified antitrust acts removed at any time.

Near the end of the debate, Senator Barkley inquired if the boycott, coercion, or intimidation provision would permit states to sanction any "combinations which might be regarded as violative of the Sherman or Clayton Acts." 91 Cong. Rec. 1486 (1945). Senator O'Mahoney, one of the Senate conferrees on the bill *id.* at 1208), responded (*id.* at 1486):

> No; my judgment is that every effective combination or agreement to carry out a program against the public interest of which I have had any knowledge in this whole insurance study would be prohibited by the very section the Senator from Kentucky has quoted.

While the Senator's comment does not properly define the precise limitations under Section 3(b)—his interpretation would appear to prohibit concerted rate-fixing by insurance companies—his interpretation is inconsistent with petitioners' narrow construction of the provision.

The source of the Act apparently was a proposed bill that the National Association of Insurance Commissioners submitted to Congress on August 29, 1944, less than three months after the decision in *South-Eastern Underwriters.* Section 4(c) of the bill provided that "[n]othing contained in this section shall render the said Sherman Act inapplicable to any act of boycott, coercion, or intimidation." 90 Cong. Rec. A4406 (1944). In accompanying documents, the Association explained the unrestricted scope of its proposed Section 4(c). It noted that it "is to take effect immediately, and perhaps needs no detailed comment. It does not preclude the application of the Sherman Act to acts of boycott, coercion, and intimidation." 90 Cong. Rec. A4407 (1944). The Association stated (90 Cong. Rec. A4406 (1944)):

> No exemption is sought nor expected for oppressive or destructive practices. On the whole, insurance has been conducted on a high plane, with great benefit to the public, and if

> inconsistent procedures are found they must be eradicated. Provision is made that the Sherman Act shall not now or hereafter be inapplicable to any act of boycott, coercion, or intimidation.

If the Association, which represented the state regulators who were concerned about the possible adverse impact of *South-Eastern Underwriters* upon their authority, wanted to limit the applicability of the Sherman Act to boycotts, coercion or intimidation that were directed only against members of the industry, it would have said so. Instead, it proposed that the Sherman Act would remain applicable to "any" of those practices.

These views of the agency that was a major proponent of the legislation and that played an important role in its drafting are entitled to substantial weight. Cf. *Chicago & North Western Railway Co.* v. *United Transportation Union,* 402 U.S. 570, 576.

2. The view that Section 3(b) is limited to "blacklists" of agents and companies and "similar punitive measures" directed against other non-policyholders (Pet. Br. 29) apparently originated in *Transnational Insurance Co.* v. *Rosenlund*, 261 F. Supp. 12 (D. Ore.). There the court referred to a single page in the Congressional Record, 91 Cong. Rec. 1087 (1945), as supporting its reading of the statute. 261 F. Supp. at 26–27. That legislative history is the foundation for subsequent opinions[3] restricting Section 3(b) to blacklists (Pet. App. 6a–7a).

[3] Principally, *Addrisi* v. *Equitable Life Assurance Society of the United States*, 503 F. 2d 725 (C.A. 9), certiorari denied, 420 U.S. 929; *Meicler* v. *Aetna Casualty & Surety Co.*, 506 F. 2d 732 (C.A. 5).

The citation is to Congressman Celler's statement that Section 3(b) was concerned not only with isolated acts, but also with agreements to boycott, coerce, or intimidate. While that statement emphasized the danger of "blacklisting" of companies and the "separation" of agents, it contains no suggestion that these were the only persons whom Congress intended to protect against boycotts, coercion and intimidation. Although Senator O'Mahoney also referred to blacklists of companies and agents (91 Cong. Rec. 1485–1486 (1945)), his statement similarly "demonstrates only that such blacklists were a concern of the Congress—perhaps even the principal concern—but does not show that they were the *only* concern." *Proctor, supra,* 561 F. 2d at 273 (emphasis in original). See Pet. App. 17a.[4]

[4] This Court's statement in *Securities and Exchange Commission* v. *National Securities, Inc.*, 393 U.S. 453, that "[t]he McCarran-Ferguson Act was an attempt to * * * assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation" (*id.* at 459; see, also, *id.* at 460) is not inconsistent with this analysis. The question in that case was whether a state law "aimed at protecting the interests of those who own securities in insurance companies" (*id.* at 458) was a law "regulating the business of insurance" under the McCarran-Ferguson Act, so that its existence barred the application of the antifraud provisions of the federal securities law to misrepresentations to stockholders made in connection with a merger of insurance companies. The Court's statement must be read in the light of the issue before it. The Court was not there dealing with the scope of Section 3(b), which involves the wholly different question of the

In the court of appeals, petitioners argued that Section 3(b) deals only with insurance company practices directed against members of the industry itself, *i.e.*, blacklisting of agents and insurance companies.[5] In this Court, however, they contend that the section has a broader reach, *i.e.*, that it applies to "traders in other industries [compelled] to conform their competitive practices to the terms of a conspiracy" (Pet. Br. 30). The same reasons that show Section 3(b) is not limited to boycotts, coercion or intimidation that are directed against members of the insurance industry, also refute petitioners' present reading of the provision. Moreover, petitioners' interpretation may well cover respondents: they are traders (doctors) compelled to conform one aspect of their competitive practices (the assurance to patients and hospitals that they possess adequate malpractice insurance) to the terms of the conspiracy.

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application of the Sherman Act to boycotts, coercion, and intimidation.

Furthermore, the kind of regulation that Congress was seeking to preserve by the McCarran-Ferguson Act was of the normal business relationships between insurers and policyholders—such as rates, policy terms and conditions, and the financial stability of the companies—that the states previously had exercised for many years. Congress was not seeking to preserve, at the expense of federal regulation, state regulation of insurance companies' boycotts, coercion and intimidation of policyholders.

[5] Brief in court of appeals for appellees St. Paul and Travelers, p. 14; Brief in court of appeals for appellees Aetna and Hartford, pp. 11–19.

II

RESPONDENTS HAVE ALLEGED A "BOYCOTT" UNDER THE SHERMAN ACT AND SECTION 3(b) OF THE McCARRAN-FERGUSON ACT

Petitioners argue (Br. 14–41) that the "boycott" charged in respondents' complaint does not constitute a "boycott" under either the Sherman Act or Section 3(b) of the McCarran-Ferguson Act. They claim that (1) a "boycott" under the Sherman Act means a concerted refusal to deal with business competitors, and (2) if a boycott were construed to include the actions alleged in the complaint, it would intrude the Sherman Act into relationships between insurance companies and their customers that the McCarran-Ferguson Act was designed to shield from federal antitrust regulation. As the court of appeals noted (Pet. App. 8a), petitioners apparently did not make the first argument in that court.

Contrary to petitioners' contention, a "boycott" under the Sherman Act is not limited to action directed against competitors, but covers any concerted refusal to deal. In *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457, 465, the Court stated that the Guild's plan to eliminate unauthorized copying of women's clothing violated the policies of the Sherman Act because, among other things, it "subjects all retailers and manufacturers who decline to

comply with the Guild's program to an organized boycott (*Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U.S. 600, 609–611)." Similarly, in *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 250, the Court upheld the Commission's finding that an agreement by a group of shipping lines prohibiting travel agents from selling tickets on vessels of nonmembers contravened the purposes of the antitrust laws, since, "[u]nder the Sherman Act, any agreement by a group of competitors to boycott a particular buyer or group of buyers is illegal *per se*."

In *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, the Court held that an alleged combination among "manufacturers, distributors and a retailer" (*id.* at 213) "either not to sell to Klor's [a competing retailer] or to sell to it only at discriminatory prices and highly unfavorable terms" (*id.* at 209), constituted a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. 1, since "[g]roup boycotts, or concerted refusals by traders by traders to deal with other traders, have long been held to be in the forbidden category" (*id.* at 212; footnote omitted).[6] See also *Union Circulation Co.* v. *Federal Trade Commission*, 241 F. 2d 652, 656–658 (C.A. 2), which held that

[6] Similarly, in *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656, upon which petitioners rely (Br. 23), the complaint alleged that the defendants had refused to sell gas to customers who purchased gas heaters from the defendants' competitors. The Court held that the complaint—which thus alleged a refusal to deal with customers—charged a violation of Section 1 of the Sherman Act.

a concerted refusal by firms selling magazines subscriptions to employ certain salesmen was an unlawful "boycott" in violation of Section 1 of the Sherman Act.[7]

Respondents' complaint charged a boycott under these principles. Respondents alleged that three of the petitioner insurance companies (Aetna, Travelers and Hartford) concertedly refused "to accept any applications for medical malpractice insurance of any type from any physicians, hospitals or other medical personnel presently insured by defendant, St. Paul" (¶ 32, Pet. App. 47a–48a). The charge was not just a refusal to deal except on certain terms, but a refusal to deal at all. Such a blanket refusal to deal is a classic example of a boycott that the Sherman Act condemns. There is accordingly no occasion in this case to determine the precise contours of what constitutes a boycott under either the Sherman Act or the McCarran-Ferguson Act (cf. Pet. Br. 14–16).

As we have shown (pp. 12–13, *supra*), the congressional purpose in the McCarran-Ferguson Act of preserving state authority to regulate and tax the business of insurance would not be thwarted by construing

[7] See, also, Kirkpatrick, *Commercial Boycotts as Per Se Violations of the Sherman Act*, 10 Geo. Wash. L .Rev. 302 (1942); Comment, *Refusals to Sell and Public Control of Competition*, 58 Yale L.J. 1121 (1949); Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. Pa. L. Rev. 847, 872 (1955); Buxbaum, *Boycotts and Restrictive Marketing Arrangements*, 64 Mich. L. Rev. 671 (1966); Rahl, *Per Se Rules and Boycotts Under the Sherman Act: Some Reflections on the Klor's Case*, 45 V. L. Rev. 1165 (1959); Note, *Concerted Refusals to Deal under the Federal Antitrust Laws*, 71 Harv. L. Rev. 1531 (1958).

"boycott, coercion, or intimidation" in Section 3(b) to cover such practices by the insurance industry when Sherman Act to the boycott charged in this case directed against policyholders. Application of the would not clash with any regulatory scheme of the state of Rhode Island, which neither requires nor sanctions such activities.[8] The situation here is thus similar to that in other cases in which this Court has held that under the McCarran-Ferguson Act the existence of state regulation of some aspects of the subject of federal regulation does not bar the latter as long as the two regulatory schemes are "perfectly compatible" (*Securities and Exchange Commission* v. *National Securities, Inc.*, 393 U.S. 453, 463 (federal securities laws); *Federal Trade Commission* v. *Travelers Health Association*, 362 U.S. 293 (false advertising)).

[8] Rhode Island has authorized its Commissioner of Insurance to require insurers to participate in a Joint Underwriting Association offering medical malpractice coverage. The Commission may require such coverage to be offered on an "occurrence" or a "claims made" basis. 1976 R.I. Pub. Laws, ch. 1, § 1 and ch. 79, § 1; R.I. Gen. Laws, § 42–14.1–1 (1976).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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